Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-472 OF 1995
SHAIK DAUD, NH CHAN AND MAHADEV SHANKAR JJCA
15 MAY 1996

Civil Procedure *— Affidavits — Affidavit in support of application — Filing and service of — Affidavit in reply must be filed and served on the other party within 14 days from the date on which the affidavit he intends to reply was served on him — Whether the 14-day period within which an affidavit in reply must be filed and served on the other party should be computed from the date on which the affidavit intended to be replied to was served or 14 days from the date of the service of the sealed copy of the summons in chambers in support of which the affidavit was sworn — Rules of the High Court 1980 O 32 r 13(2)*

On 27 December 1994, the defendants' solicitors served upon the plaintiff's solicitors an unsealed copy of summons in chambers to set aside a judgment in default and a file copy of the affidavit in support. On 29 December 1994, the plaintiff was served a sealed copy of the summons in chambers. Thereafter on 11 January 1995, the plaintiff affirmed an affidavit in reply to the defendants' supporting affidavit and served it the same day upon the defendants' solicitors.

On the first return date of the summons in chambers, the defendants took a preliminary objection to the admissibility of the plaintiff's affidavit in reply. The ground for the preliminary objection was that more than 14 days had elapsed from the date of the unsealed copy of the summons in chambers and the affidavit in support (ie 27 December 1994) to the date on which the plaintiff's affidavit in reply was filed and served (ie 11 January 1995), ie delay of one day. The registrar accepted the plaintiff's explanation for the delay and overruled the preliminary objection. The defendants' appeal to the High Court against the dismissal of the preliminary objection was dismissed with costs. The judge in the court below held that time only began to run from the date of the sealed copy of the summons in chambers. In the alternative, the judge held that the delay of one day had not prejudiced the defendants and that the court could therefore accept the affidavit under the curative provisions of O 2 r 1(1) of the Rules of the High Court 1980 ('the RHC'). The defendants appealed.

The issue was whether the 14-day period within which an affidavit in reply must be filed and served on the other party should be computed from the date on which the affidavit intended to be replied to was served or 14 days from the date of the service of the sealed copy of the summons in chambers in support of which the affidavit was sworn.

Held, dismissing the appeal:

The critical words in O 32 r 13(2) — even though the plaintiff's affidavit in reply should have been filed and served within 14 days from the date of service of the affidavit in support of the application, ie on or before 10 January 1995, the registrar had correctly exercised his discretion under O 2 of the RHC in favour of the plaintiff — for the purposes of computation of time — were 'within 14 days from the date *of the filing* of the application'. Accordingly, time was to run not from the date on which the application was sealed but the date on which the application was filed. The object of the exercise in this provision was to give the adverse party notice as soon as possible without reference to the eventual date when the application would be sealed in the registry. By the time that event took place, it was envisaged that the affidavit in reply would already be in place and the registry would therefore be in a better position to allot the return date on which the application should be heard. In this matter, the court exercised its discretion under O 2 of the RHC in favour of the plaintiff (see p 586C–E).

Obiter:

It was to be noted that the issue of late filing would not be an issue unless the adverse party raised an objection. If he did not do so and took a step in the action, the non-compliance would be regarded as having been waived. If an objection was taken, the court would have to take the necessary steps under O 2. This would call for an exercise of discretion which should be appropriately exercised in the circumstances (see p 586F).

[Bahasa Malaysia summary

Pada 27 Disember 1994, peguamcara defendan menyampaikan ke atas peguamcara plaintif sesalinan saman dalam kamar yang tidak dimeterai bagi mengetepikan penghakiman ingkar dan sesalinan afidavit menyokong. Pada 29 Disember 1994, plaintif disampaikan dengan sesalinan meterai saman dalam kamar. Selepas itu pada 11 Januari 1995, plaintif mengesahkan suatu afidavit jawapan kepada afidavit menyokong defendan dan menyampaikannya ke atas peguamcara defendan pada hari itu juga.

Pada hari pertama tarikh kembalian saman dalam kamar, defendan membuat bantahan permulaan kepada penerimaan afidavit jawapan plaintif. Alasan untuk bantahan permulaan adalah bahawa lebih daripada 14 hari telah luput dari tarikh salinan saman dalam kamar yang tidak dimeterai dan afidavit menyokong (iaitu 27 Disember 1994) ke tarikh apabila afidavit jawapan plaintif difailkan dan disampaikan (iaitu 11 Januari 1995), iaitu kelewatan sehari. Pendaftar menerima penjelasan plaintif untuk kelewatan dan menolak bantahan permulaan. Rayuan defendan kepada Mahkamah Tinggi terhadap penolakan bantahan permulaan telah ditolak dengan kos. Hakim di

mahkamah bawah memutuskan bahawa masa hanya bermula dari tarikh salinan meterai saman dalam kamar. Sebagai alternatif, hakim memutuskan bahawa kelewatan sehari tidak menjejaskan defendan-defendan dan bahawa mahkamah dengan itu boleh menerima afidavit di bawah peruntukan kuratif A 2 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan-defendan merayu.

Isu adalah sama ada tempoh 14 hari dalam mana suatu afidavit jawapan mesti difailkan dan disampaikan pada pihak yang satu lagi harus dikira dari tarikh apabila afidavit yang ingin dijawab disampaikan atau 14 hari dari tarikh penyampaian salinan meterai saman dalam kamar di mana afidavit disumpah bagi menyokongnya.

Diputuskan, menolak rayuan:

Perkataan-perkataan kritikal dalam A 32 k 13(2) — sungguhpun afidavit jawapan plaintif sepatutnya difailkan dan disampaikan dalam tempoh 14 hari dari tarikh penyampaian afidavit menyokong permohonan itu, iaitu pada atau sebelum 10 Januari 1995, pendaftar telah melaksanakan budi bicara beliau dengan betul di bawah A 2 KMT memihak kepada plaintif — untuk tujuan pengiraan masa — adalah 'dalam tempoh 14 hari dari tarikh *pemfailan* permohonan'. Ekoran itu, masa bermula bukan dari tarikh apabila permohonan dimeterai tetapi pada tarikh apabila permohonan difailkan. Objek pelaksanaan dalam peruntukan ini adalah untuk memberikan pihak bertentangan notis secepat mungkin tanpa merujuk kepada tarikh akhirnya apabila permohonan akan dimeterai dalam daftar. Apabila tiba masa perkara itu berlaku, adalah dibayangkan bahawa afidavit jawapan sudah pun dalam keadaan teratur pada tempatnya dan dengan itu daftar akan berada dalam keadaan yang lebih baik bagi memperuntukkan tarikh kembalian apabila permohonan itu harus didengar. Dalam perkara ini, mahkamah telah melaksanakan budi bicara di bawah A 2 KMT memihak kepada plaintif (lihat ms 586C–E).

Obiter:

Harus diperhatikan bahawa isu pemfailan lewat tidak menjadi isu melainkan pihak bertentangan membangkitkan bantahan. Jika dia tidak berbuat demikian dan mengambil langkah dalam tindakan itu, ketidakpatuhan akan dianggap telah diketepikan. Jika sesuatu bantahan dibuat, mahkamah harus mengambil langkah yang perlu di bawah A 2. Ini menghendaki pelaksanaan budi bicara yang harus dilaksanakan dengan wajar dalam keadaan sedemikian (lihat ms 586F).]

Notes

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Cases referred to

Malayan Banking Bhd v Lim Tee Yong & Ors [1994] 3 MLJ 715 (refd)

PB Securities Sdn Bhd v Abdul Rashid bin Mohamed [1994] 3 MLJ 168 (refd)

Pua Lai Ong v Perbadanan Nasional Insurans Sdn Bhd [1995] 3 MLJ 175 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 r 1(1), O 32 rr 12(2), 13(2)

Appeal from: Civil Suit No D1–22–1286–93 (High Court, Kuala Lumpur)

CL Chin (*Chin & Rakan-Rakan*) for the appellants.
SE Wong (*Fatimah Kei & Leong*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): This appeal turns upon the proper construction of O 32 r 13(2) of the Rules of the High Court 1980 ('the RHC'). The issue is whether the 14-day period within which an affidavit in reply must be filed and served on the other party should be computed from the date on which the affidavit intended to be replied to was served or 14 days from the date of the service of the sealed copy of the summons in chambers in support of which the affidavit was sworn. There are conflicting High Court opinions on this matter.

This writ of summons and statement of claim were filed on 10 December 1995. The claim was for goods sold and delivered by the plaintiff to the first defendant. The second, third and fourth defendants were guarantors. On 26 August 1994, the plaintiff obtained a judgment in default of appearance against the first and the second defendants. The judgment was then extracted and on 9 November 1994, the plaintiff served the default judgment on the first and second defendants.

On 22 December 1994, the first and second defendants filed a summons in chambers to set aside the default judgment. Together with the summons, the first and second defendants filed an affidavit in support which had been affirmed on 21 December 1994.

As usual, it took some time for the first and second defendants to get a sealed copy of the summons in chambers from the registry. The date of hearing of the summons in chambers was endorsed therein when the summons was sealed.

On 27 December 1994, the defendants' solicitors served upon the plaintiff's solicitors an unsealed copy of the summons in chambers and a file copy of the affidavit in support. On 29 December 1994, the plaintiff was served with a sealed copy of the summons in chambers.

A Thereafter on 11 January 1995, the plaintiff affirmed an affidavit in reply to the defendants' supporting affidavit and served it the same day upon the defendants' solicitors.

The first return date of the summons in chambers was 13 February 1995. On that day, the defendants took a preliminary objection to the B admissibility of the plaintiff's affidavit in reply. The ground for this preliminary objection was that more than 14 days had elapsed from the date of the service of the unsealed copy of the summons in chambers and the affidavit in support (ie 27 December 1994) to the date on which the plaintiff's affidavit in reply was filed and served (ie 11 January 1995). It is to be noted that upon this calculation, the 14-day period would have C expired on 10 January 1995. Accordingly, the delay — if there was one — was only for one day.

On the other hand, if the period had been computed from the date of the service of the sealed copy of the summons in chambers — ie 29 December 1994 — then the affidavit in reply would have been served D within time.

The registrar directed the plaintiff to file a further affidavit to explain why the delay had occurred and, accordingly, the plaintiff's solicitors filed a further affidavit on 4 May 1995 in which it was explained that the plaintiff had misplaced a document upon which they wished to rely, that E this was found on 10 January 1995 and therefore the affidavit in reply had been affirmed and filed on 11 January 1995.

The registrar accepted this explanation and on 16 May 1995 overruled the preliminary objection.

It is not clear whether the deputy registrar then proceeded to deal F with the application on the merits. What we know is that the defendants immediately appealed to the judge against the dismissal of the preliminary objection. The judge dismissed the appeal on 10 July 1995 with costs. Against this dismissal the first and second defendants have appealed to this court.

G The judge in the court below held — following the decision in *Pua Lai Ong v Perbadanan Nasional Insurans Sdn Bhd* [1995] 3 MLJ 175 — that time only began to run from the date of the sealed copy of the summons in chambers. The rationale for that decision was based on the effect of O 32 r 2(1) of the RHC, whereby the issue of a summons by which an application in chambers is to be made takes place on its being H sealed, by an officer of the registry. In other words, until the summons is sealed it cannot be said that there is an application pending. In the alternative, the judge in the court below held that the delay of one day had not prejudiced the defendants and that the court could therefore accept the affidavit under the curative provisions of O 2 r 1(1) of the RHC.

I The object of O 32 r 13(2) was set out by Richard Tallala J in *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168 at p 174 where he said this:

> As I understand it, r 13 originally stood as it now does in sub-r (1) thereof. Rule 13(2) which was introduced by amendment which came into effect on

> 1 August 1993 was effected to bring order to disorder created in the hearing of applications in chambers by parties filing affidavits at the eleventh hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in questions having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rules Committee in introducing r 13(2) intended that its provisions should apply to the well-entrenched and I would say more stringent procedure applicable to O 14.

We would respectfully adopt these observations.

However, we would like to add that the critical words in O 32 r 13(2) — for the purposes of computation of time — are 'within 14 days from the date *of the filing* of the application' and in O 32 r 13(2)(b) within 14 days from the date of service.

Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. Consequently, we are unable to agree with the part of the judgment of the learned judge in the court below and in the case of *Pua Lai Ong* earlier referred to. The object of the exercise there is to give the adverse party notice as soon as possible without reference to the eventual date when the application would be sealed in the registry. By the time that event took place it was envisaged that the affidavit in support of the application would already be in place and the registry would therefore be in a better position to allot the return date on which the application should be heard.

It is to be noted that the issue of late filing will not be a problem unless the adverse party raises an objection. If he does not do so and takes a step in the action, the non-compliance will be regarded as having been waived. If an objection is taken, the court will have to take the necessary steps under O 2. This will call for an exercise of discretion which should be appropriately exercised in the circumstances. *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715 is an instance where after objection was taken, the court rejected an affidavit in reply which had been filed after a delay of 2½ months.

Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case.

In the particular matter before us, we regret that the defendants' solicitors thought fit to carry their objection as far as they have done. By so doing, they may have gained their clients' time. It is very doubtful if they have served the ends of justice.

We hope that to some extent the plaintiff will be compensated by the costs which we have ordered the defendants to pay both in this court and in the High Court and before the deputy registrar.

Appeal dismissed.

Reported by Loo Lai Mee